MULPHA PACIFIC SDN BHD

v.

PARAMOUNT CORPORATION BHD

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
MOHD NOOR AHMAD JCA
MOHD GHAZALI YUSOFF JCA
[CIVIL APPEAL NO: B-02-350-1998]
3 SEPTEMBER 2003

CONTRACT: *Interest - Construction of terms - Agreement for sale and purchase of shares - Extension of time to pay balance of purchase price - Agreed interest - Transaction aborted - Whether accrued agreed-interest payable despite fact that agreement was repudiated by purchaser and terminated by vendor*

This was a simple appeal from the decision of the learned judge ordering the defendant/purchaser to pay the plaintiff/vendor the sum of RM776,712.33 as accrued agreed-interest ('the said interest') under an agreement ('the agreement') entered into by the parties for the sale and purchase of certain shares in a company. The dispute between the parties emanated from cl. 4.2 of the agreement which provided, *inter alia*, that "the purchaser shall be entitled to an extension of one (1) month, commencing on the day immediately after the Completion Date (hereinafter referred to as 'the Extended Completion Date'), subject to payment of the Agreed Interest calculated on a daily basis on the balance sum outstanding, provided that all accrued Agreed Interest shall be paid together with the balance sum". The sole issue that fell for determination was whether, upon a true construction of cl. 4.2 of the agreement, the said interest was still payable by the defendant to the plaintiff **despite** the fact that the agreement eventually fell through and was repudiated by the defendant and terminated by the plaintiff.

Held (dismissing the appeal):
Per Mohd Ghazali Yusoff JCA

[1] The learned judge was right in holding that cl. 4.2 of the agreement allowed the defendant to buy additional time, without which the defendant would be in default, and the deposit would then be forfeited as a result. If the defendant wished to have additional time to pay the outstanding balance due, then it must provide additional consideration for that period of additional time during which the plaintiff would be unable to utilise the outstanding balance. This additional consideration was to take the form of accrued agreed-interest, and it would be distinct and separate from the consideration for the purchase of the shares. In such circumstances, the court would have no alternative but to give effect to the intention of the parties as discerned from the plain meaning of the words used in clause 4.2 of the agreement. (pp 299 e-g, 300 a-g, 301 a-h & 302 a-c)

[Defendant's appeal dismissed; decision of learned judge upheld; interest payable.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini merupakan rayuan ringkas dari keputusan yang arif hakim yang memerintahkan defendan/pembeli untuk membayar plaintif/penjual wang sejumlah RM776,712.33 sebagai faedah terakru yang dipersetujui ('faedah tersebut') dibawah satu perjanjian ('perjanjian tersebut') yang dimasukki oleh kedua-dua pihak untuk jualbeli saham sebuah syarikat. Pertelingkahan diantara kedua pihak ini berpunca dari kl. 4.2 perjanjian tersebut yang memperuntukan, antara lain, bahawa "pembeli akan mempunyai hak kepada satu perlanjutan masa selama satu (1) bulan, bermula sebaik sahaja dari hari selepas Tarikh Siap (selepas ini dirujuk sebagai 'Tarikh Siap Lanjutan'), tertakluk kepada bayaran Faedah Yang Dipersetujui yang dikira pada kadar harian atas jumlah baki belum bayar, dengan syarat bahawa kesemua Faedah Yang Dipersetujui yang terakru mesti dibayar bersama dengan jumlah baki belum bayar". Isu tunggal untuk diputuskan adalah samada, mengikut pentafsiran sebenar kl. 4.2 perjanjian tersebut, faedah tersebut masih perlu dibayar oleh defendan kepada plaintif walaupun perjanjian tersebut telah gagal dan telah ditolak oleh defendan dan ditamatkan oleh plaintif.

Diputuskan (menolak rayuan):
Oleh Mohd Ghazali Yusoff HMR

[1] Yang arif hakim sememangnya betul dalam memutuskan bahawa klausa 4.2 perjanjian tersebut membenarkan defendan untuk membeli masa tambahan, tanpanya defendan akan ingkar, dan wang muka akan lupus. Jika defendan berhajat untuk mengambil masa tambahan untuk membayar baki kenabayar yang belum dibayar, maka beliau hendaklah memberi balasan tambahan untuk tempoh masa tambahan yang mana plaintif tidak dapat menggunakan baki belum bayar. Balasan tambahan ini adalah dalam bentuk faedah yang dipersetujui yang terakru, dan ianya berbeza dan berasingan dari balasan untuk pembelian saham-saham tersebut. Dalam keadaan sebegini, mahkamah tidak mempunyai alternatif dan kena menguatkuasakan niat pihak-pihak sebagaimana yang tampak dari erti jelas perkataan-perkataan yang digunakan di dalam kl. 4.2 perjanjian tersebut.

Rayuan defendan ditolak; keputusan yang arif hakim disahkan; faedah kena bayar.]

Case(s) referred to:
The Royal Selangor Golf Club v. Anglo-Oriental (Malaya) Sdn Bhd [1990] 1 CLJ 995; [1990] 3 CLJ (Rep) 37 HC ***(foll)***

For the appellant/defendant - Manjit Singh (Mohan Krishnan); M/s A Zahari & Partners
For the respondent/plaintiff - I Jeganathan; M/s SK Yeoh & Jeganathan

[Appeal from High Court, Shah Alam; Originating Summons No: MT3-792-1997]

Reported by Gan Peng Chiang

JUDGMENT

Mohd Ghazali Yusoff JCA:
This dispute arose from the termination of an agreement for the sale and purchase of shares of a company entered into between the appellant as purchaser and the respondent as vendor. On 22 May 1998 the learned judge gave judgment in favour of the respondent and ordered the appellant to pay RM776,712.33 together with interest from 21 November 1997 to date of payment to the respondent. The appellant appealed to this court. The following are the agreed facts:

(1) On 17 April 1997 the respondent (vendor) and the appellant (purchaser) executed an agreement for the sale and purchase of shares of a company named Wangsa Merdu Sdn Bhd ("the agreement") at the agreed price of RM90 million.

(2) Pursuant to the agreement, the appellant paid RM9 million, ie, 10% of the purchase price as deposit leaving a balance of RM81 million to be paid ("the balance sum").

(3) Clause 4 of the agreement entitled "Completion Date and Extended Completion Date" reads:

> 4.1. Subject to the provisions of this Agreement, the Completion Date for the sale and purchase of the Sale Shares shall be seven (7) business days after the day the Purchaser receives the FIC approval or within six (6) months commencing from the day after the date of this Agreement, whichever is later (herein referred to as "the Completion Date").
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> 4.2. PROVIDED ALWAYS and it is hereby agreed between the parties hereto that the purchaser shall be entitled to an extension of one (1) month, commencing on the day immediately after the Completion Date (hereinafter referred to as "the Extended Completion Date") subject to payment of the Agreed Interest calculated on a daily basis on the Balance Sum outstanding Provided that all accrued Agreed Interest shall be paid together with the Balance Sum.

Clause 1.1 of the agreement entitled "interpretation" provides the words "agreed interest" shall mean "interest at the rate of ten per centum (10%) per annum". Pursuant to cl. 4.2 of the agreement the parties agreed that if the appellant paid interest at 10% p.a. calculated on a daily basis on the outstanding balance sum, the appellant would be entitled to an additional month to pay the balance sum.

(4) By letter dated 13 October 1997 the appellant informed the respondent that they would be taking the additional month. Thus, the balance sum became due for payment on 17 November 1997.

(5) The appellant subsequently informed the respondent that they required an additional three days from 17 November 1997 to pay the balance sum. Thus, the balance sum became due for payment on 20 November 1997.

(6) By notice dated 20 November 1997, the appellant informed the respondent that they now refuse to pay the balance sum due on 20 November 1997.

(7) In response thereto, the respondent's solicitors informed the appellant, by letter dated 21 November 1997, that the respondent was:

(a) terminating the agreement;

(b) forfeiting the deposit; and

(c) demanding payment of RM776,712.33 being the agreed interest accrued on the balance sum for 35 days from 17 October 1997 to 20 November 1997 (inclusive) failing which interest shall continue to accrue on the sum of RM776,712.33.

(8) By letter dated 28 November 1997 the appellant's solicitors contended that pursuant to cl. 13.1 of the agreement, the parties have specifically agreed that the remedy to the respondent is to forfeit the deposit; the appellant does not agree that interest in the amount as claimed is due to the respondent on termination of the agreement. Clause 13.1 of the agreement reads:

> Subject to the fulfillment of the Conditions Precedent, if the Purchaser shall fail neglect and/or refuse to pay the Final Balance and the Inter-Company Loan at the time set out in Clauses 4.1 or 4.2 hereof or in the manner set out in Clause 6 hereof, the Vendor shall be at liberty to terminate this Agreement by notice to the Purchaser whereupon the Deposit shall be forfeited to the Vendor absolutely and thereafter this Agreement shall terminate and rendered null and void.

The appellant refused to pay the interest and hence, this suit. In his grounds of decision, the learned judge said the sole issue for determination by the court is whether the appellant is liable to the respondent in the sum of the accrued "agreed interest" for the additional time granted to the appellant. The respondent contended that upon a proper and true construction of cl. 4.2 of the agreement, they are entitled to, and the appellant is liable to pay them, the aforesaid sum of RM776,712.33 as claimed. In opposing the claim, the appellant submitted:

(i) that the deposit of RM9 million is also consideration for the "additional time";

(ii) that they are excused from making payment of agreed interest for "additional time" utilised by them because they had decided to deliberately default the agreement by refusing to pay the balance sum;

(iii) that the "agreed interest" is to be considered in similar breath with the balance sum, which are not separate debts or obligations;

(iv) that if they fail or decide to breach or refuse to pay the balance sum, they are also not obliged to pay the "agreed interest";

(v) that in the alternative, the charging of interest is a penalty and "loss" and has to be proved before the respondent is entitled to the same;

(vi) that further in the alternative, in any event, based on cl. 13.1 of the agreement, upon forfeiture of the deposit, the respondent is not entitled to any other remedy or to recover any other losses.

The learned judge was of the view:

(i) that the words "subject to payment of the agreed interest" in cl. 4.2 of the agreement means that the payment of interest prevails so that additional time is only granted because the appellant had agreed at all times to pay interest of the additional time. He said:

> Therefore this part of Clause 4.2 provides that in consideration of the Plaintiff (respondent) agreeing to grant additional time to the Defendant (appellant), the Defendant agreed to pay daily sums calculated on the Agreed Interest rate to the Plaintiff for each day granted. Hence, the payment of interest prevails and is indeed a condition precedent to the granting of additional time by the Plaintiff to the Defendant. This obligation to pay interest is obviously in addition to the Defendant's obligation to pay the Balance Sum.

(ii) that the words "together with" appearing in the words "all accrued agreed interest shall be paid together with the balance sum" means that the accrued "agreed interest" is to be paid at the same time fixed by cl. 4.2 of the agreement for the payment of the balance sum, which in this case was originally 17 October 1997, then extended by one month to 17 November 1997 and finally to 20 November 1997; he said:

> Clause 4.2 allows the Defendant (appellant) to buy additional time, without which the Defendant would already be in default and the Deposit would consequently be forfeited. If the Defendant wishes to have additional time to make payment of the Balance Sum, then the Defendant must provide additional consideration for the period of additional time that the Plaintiff (respondent) is put out of use of the Balance Sum. This additional consideration is to take the form of accrued Agreed Interest and is distinct and separate from the consideration for the purchase of the Shares.

We agree with the views of the learned judge. From our reading, what is crystal clear is that cl. 4.2 of the agreement allowed the appellant to request for an additional month to pay the balance sum on condition that they pay interest calculated on a daily basis. It is not disputed that the appellant did so request and consum the additional month plus 3 days of additional time, namely, 35 days. At the end of the 35 days, the appellant breached the agreement and refused to pay the balance sum, whereupon the respondent rightly accepted the appellant's repudiation and terminated the agreement. Consequently, the respondent is entitled to forfeit the deposit pursuant to cl. 13.1 of the agreement.

Before us, the appellant's counsel argued that interest is only payable if the appellant completes the transaction. We cannot fathom this argument. We would agree with the contention of the respondent's counsel that the respondent would be entitled to claim interest amounting to RM776,712.33 for the additional month plus 3 days even if the appellant had not breached the agreement and had completed the transaction. We would also agree with his contention that the right to calculate and demand payment of interest in consideration for granting additional time for the fulfilment of a contractual obligation is not a penalty or liquidated damages to be proved for the following reasons:

(a) the respondent's right to claim interest only arises because the appellant requested for time and was granted such time;

(b) the respondent's right to claim interest arises from accord and satisfaction and does not depend on any breach by the appellant, and is thus, neither a penalty nor liquidated damages.

In relation to this, the learned judge said:

> The accrued Agreed Interest is a separate debt due from the Defendant (appellant) to the Plaintiff (respondent) and must not be confused or "merged" with the Balance Sum. In fact, the parties have taken particular pains to define the meaning of "Agreed Interest" and the "Balance Sum" distinctly and separately.

The intention of the parties were clear. It was agreed that the granting of additional time is subject to agreement to pay "agreed interest". It was also agreed that "agreed interest" has to be paid even if the appellant breaches the agreement. The words "deposit" and "final balance" were specifically defined in the agreement and clearly does not include accrued "agreed interest".

In *The Royal Selangor Golf Club v. Anglo-Oriental (Malaya) Sdn Bhd* [1990] 1 CLJ 995, Lim Beng Choon J said:

> In considering the disputes of the parties I must first of all bear in mind the general principles of construction of contract as enunciated in the *National Coal Board v. Wm Neill & Son (St Helen)* [1984] 1 All ER 555 where it is said at p. 560:
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> > The first two issues involve the construction of the contract. I bear in mind the principles of construing a contract. The relevant ones for the purpose of this case are: (1) construction of a contract is a question of law; (2) where the contract is in writing the intention of the parties must be found within the four walls of the contractual documents; it is not legitimate to have regard to extrinsic evidence (there is, of course, no such evidence in this case); (3) a contract must be construed as at the date it was made: it is not legitimate to construe it in the light of what happened years or even days later; (4) the contract must be construed as a whole, and also, so far as practicable, to give effect to every part of it.
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> In *Central Bank of India v. Hartford Fire Insurance Co Ltd.* AIR [1965] SC 1288, the Supreme Court of India lays stress on the second principle advocated in the *Wm Neill & Sons (St Helens) Ltd* case when it says at p. 1290:
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> > Now it is commonplace that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however much it may dislike the result.

We are satisfied that the learned Judge in the instant case applied the general principles discussed above when he decided as he did. The intention of the parties must be ascertained from the words used in the agreeement. Whichever way we look at cl. 4.2 of the agreement, we are of the view that the respondent would be entitled to claim interest for the additional month plus 3 days even if the appellant had not breached the agreement and had completed the transaction. Our sympathies are with the appellant. The RM9 million which they paid as deposit have been forfeited and, in addition to that, they have been ordered to pay interest amounting to the sum of RM776,712.33 together with interest from 21 November 1997 to date of payment. But then, the court must give effect to the plain meaning of the words of cl. 4.2 of the agreement however much it may dislike the result. Under the circumstances, we see no reason to disagree with the decision of the learned judge.

For the reasons stated above, we dismissed this appeal with costs.